No. 82-1150

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IN THE
Supreme Court of the United States

October Term, 1982

HOWARD ELLIS, et al.,

Petitioners,

v.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, et al.,

Respondents.

ALLEN L. FAILS, et al.,

Petitioners,

v.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, et al.,

Respondents.

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Pursuant to Sup. Ct. R. 22.5, petitioners Howard Ellis, *et al.*, and Allen L. Fails, *et al.*, file this reply brief in support of the petition for writ of certiorari.

I

PROPER DELINEATION OF UNION ACTIVITIES CHARGEABLE TO DISSENTERS IS A QUESTION OF LAW

BRAC[1] has attempted to portray the Ninth Circuit's holding that expenditures for organizing, conventions and publications, litigation, the death benefit program, and Grand Lodge social activities are chargeable to dissenting employees as a factual question. (*See* Opp. at 8-13).[2] The reasoning of both the district court and the Ninth Circuit in deciding whether those expenditures are chargeable under Railway Labor Act § 2, Eleventh, 45 U.S.C. § 152, Eleventh (1976), was founded upon their reading of *Railway Employes' Dept. v. Hanson*, 351 U.S. 225 (1956), *International Ass'n of Machinists v. Street*, 367 U.S. 740 (1961), *Brotherhood of Ry. Clerks v. Allen*, 373 U.S. 113 (1962), and *Abood v. Detroit Bd. of Education*, 431 U.S. 209 (1977). *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks*, 78 Lab. Cas. ¶ 11, 290 (S.D. Cal. January 21, 1976) (App. at 24a);[3] *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks*, 685 F.2d 1065, 1072 (9th Cir. 1982) (App. at 9a-10a).

The Ninth Circuit, in reviewing the chargeability of the paragraph 22 expenditures at issue recognized the *definitional* problem in drawing the line between chargeable and non-chargeable activities. *Id.* The court rejected petitioners' argument that the first amendment implications inherent in the collection and use of compulsory dues and agency fees payments from protesting employees require that chargeable expenditures be limited to payments directly related to contract negotiation, contract administration, and grievance adjustment.

The Ninth Circuit ruled as a matter of law that the standard of chargeability is whether a particular expenditure is "germane to the union's work in the realm of collective bargaining," *id.* (App. at 10a), a nebulous test making virtually every union expenditure outside of the political and ideological area chargeable to dissenting employees. The Ninth Circuit's finding that expenditures for Grand Lodge conventions,

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[1] "BRAC" refers to all respondents.

[2] "(Opp. at ____)" refers to respondents' brief in opposition.

[3] "(App. at ____)" refers to the appendices to the petition for writ of certiorari.

litigation, publications, social activities, death benefits, and organizing efforts are chargeable to dissenting employees is entirely premised upon its promulgation of an unwarrantedly expansive definition of collective bargaining activities.

Petitioners maintain that the Ninth Circuit majority opinion has misconstrued this Court's holdings in *Hanson, Street, Allen,* and *Abood.* These decisions hold that only expenditures for contract negotiation, contract administration, and grievance adjustment are chargeable to dissenters. However, those principles are stated abstractly, as in each case the factual record was deemed inadequate. This Court's application of the rule of chargeability in these cases, where there is a fully developed factual record of the range of union activities, will necessarily address the paragraph 22 expenditures at issue.

II

THE NINTH CIRCUIT APPROVED BRAC'S REBATE SCHEME AS A PROSPECTIVE REMEDY

The Ninth Circuit's endorsement of a rebate procedure as an adequate remedy to protect the constitutional rights of dissenting employees was not, as BRAC contends, limited to retroactive relief. The rebate program adopted by BRAC, by its terms, applies prospectively. *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks,* 685 F.2d at 1069 (App. at 5a). The BRAC rebate procedure was adopted in October, 1975 and applied only to political and ideological expenditures, which BRAC admits are non-chargeable. The rebate procedure was applied prospectively for 1976 and 1977 expenditures after the district court's January 21, 1976 summary judgment ruling. (App. at 30a-31a). The district court imposed a dues reduction procedure upon BRAC in its 1980 order and judgment (App. at 31a, 34a), but the district court's final judgment was stayed pending BRAC's appeal.

The Ninth Circuit's majority decision endorsed the rebate scheme as a prospective remedy. It read *Street* as endorsing a rebate procedure as one of two possible remedies. 685 F.2d at 1069 (App. at 6a). The majority also erroneously found that this Court had approved a rebate procedure in *Abood.* 685 F.2d at 1070 (App. at 6a). In *Abood,* the internal union procedure did not provide for a dues reduction. 431 U.S. at

1040 n. 41. The Ninth Circuit's decision nowhere discusses the dues reduction remedy imposed by the district court upon BRAC.

In addition to the conflict with this Court's decisions, there are conflicts between the Ninth Circuit's decision in *Ellis* and the decisions in *School Comm. of Greenfield v. Greenfield Education Ass'n*, 385 Mass. 70, 431 N.E.2d 180 (1982), *Robinson v. New Jersey*, 547 F.Supp. 1297 (D. N.J. 1982), *Beck v. Communications Workers of America*, 1983 Daily Lab. Rep. No. 48, D-1, D-3 (D. Md. March 4, 1983) (Supp. App. at 20a),[4] and *Ball v. City of Detroit*, 85 Mich. App. 383, 269 N.W.2d 607 (1978).[5] The presence of direct conflicts between these decisions and the Ninth Circuit's *Ellis* decision makes it appropriate for this Court to grant the petition for writ of certiorari.

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[4] "(Supp. App. at ____)" refers to the appendix to petitioners' supplemental brief.

[5] The fact that the decisions in *Ball* and *Robinson* are interlocutory does not preclude a finding of conflict jurisdiction. (*See* Opp. at 7 n. 4) In *Curtis v. Loether*, 415 U.S. 189, 191 n. 2 (1974), this Court granted a petition for a writ of certiorari based upon conflict between the decision of the United States Court of Appeals for the Seventh Circuit and evenly divided reported decisions of district courts with regard to a right of trial by jury in actions under Title VIII of the Civil Rights Act of 1964. *Kelly v. Armbrust*, 351 F.Supp. 869 (D. N.D. 1972); *Caulley v. Smith*, 347 F.Supp. 114 (E.D. Va. 1972); and *Kastner v. Brackett*, 326 F.Supp. 1151 (D. Nev.1971), were all interlocutory decisions either granting or denying a demand for a jury trial. *See City of Morgantown v. Royal Insurance Co., Ltd.*, 337 U.S. 254 (1949) (denial of a demand for a jury trial is a non-appealable interlocutory order); *accord Corchran v. Birkel*, 651 F.Supp. 1219, 1221 (6th Cir.), *cert. denied*, 454 U.S. 1152 (1981). When the petition for writ of certiorari was filed, the *Beck* decision was interlocutory. At the time the opposition to the petition was filed, a final decision in *Beck* had been issued. *Beck v. Communications Workers of America, supra*, adopts the permanent injunctive relief requiring escrowing of agency fees. (Supp. App. at 20a). Lawrence J. Gold, one of the attorneys representing respondents here, is also counsel for the defendants in *Beck*. The brief in opposition failed to advise this Court of the decision in *Beck* which is ripe for the entry of final judgment.

III

THE CLEAR AND CONVINCING EVIDENCE TEST IS THE ONLY APPROPRIATE STANDARD OF PROOF

BRAC has the burden of proving that it is not charging dissenting employees more than a pro rata share of its contract negotiation, contract administration, and grievance adjustment expenditures. *Brotherhood of Ry. Clerks v. Allen*, 373 U.S. at 122, *cited with approval in Abood v. Detroit Bd. of Education*, 431 U.S. at 239 n. 40. The heightened judicial solicitude given to the protection of first amendment freedoms at stake in disputes involving the exaction of compulsory union dues and agency fees requires the application of the clear and convincing evidence standard.[6] This reasoning was endorsed in *Beck v. Communications Workers of America*, 1983 Daily Lab. Rep. No. 48, at D-3 (Supp. App. at 16a-18a); relying upon this Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976) and *Abood v. Detroit Bd. of Education*, 431 U.S. at 234.

The need for the application of the clear and convincing evidence test is illustrated by an example contained within the record in this case. Despite BRAC's protestation that its records were maintained in accordance with generally accepted accounting principles, no attempt was made by BRAC to refute the proven existence of its unlawful money-laundering scheme which illegally channeled funds of union members into the campaigns of political candidates endorsed by the AFL-CIO. CR 141 at 3-5 and Exhibits E-O thereto. That scheme was accomplished in collaboration with officials of the AFL-CIO.

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[6] The opposition mischaracterizes statements by counsel on an issue pertinent to the requisite standard of proof. By quoting only a portion of remarks made by counsel for petitioners, it is implied that counsel conceded the validity of BRAC's accounting practices. The implication is false, as demonstrated by consideration of the entirety of counsel's remarks. (*See* Opp. at 14). The telling comment omitted by respondents is the remainder of Mr. Merrill's remark: "We don't have that information." RT August 10, 1978 at 1103. The inquiry and response related to the rebate of political expenditures prior to the institution of the October 6, 1975 rebate scheme. As of the time of trial, there was no way that plaintiffs could know whether or not all of the funds pertaining to such expenditures had been rebated to plaintiffs, as (a) the lack of records of political expenditures made calculation of any such amounts a matter of guesswork, and (b) additional rebates had been made by the union prior to trial, but after the cutoff of discovery. Plaintiffs had no way of verifying the basis of such rebates.

CONCLUSION

Abundant cause exists for the grant of a writ of certiorari, by virtue of the transcendent importance of these cases and the existence of serious conflicts of principles of law. In these cases, petitioners present the Court with an appropriate record and detailed judicial decisions which will permit the resolution of issues which have plagued our judicial system for decades.

Respectfully submitted,

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